

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SOUTHERN PACIFIC TRANSPORTATION
COMPANY

VS.

EUREKA INVESTMENT COMPANY AND
MUSTANG TRACTOR AND EQUIPMENT
COMPANY

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CIVIL ACTION NO. H-82-0316

DEFENDANTS' ANSWER AND RESPONSE
TO PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE WOODROW B. SEALS, DISTRICT JUDGE:

COME NOW, EUREKA INVESTMENT COMPANY and MUSTANG TRACTOR AND EQUIPMENT COMPANY, Defendants herein and sometimes hereinafter collectively referred to as "Defendants", and file their Rule 12(b) Motion and Original Answer to the Original Complaint filed herein by SOUTHERN PACIFIC TRANSPORTATION COMPANY, Plaintiff herein and hereinafter referred to as "Plaintiff", respectfully stating:

MOTION PURSUANT TO RULE 12(b)(7)

1. Defendants object to the failure of Plaintiff to join OLIN CORPORATION, the entity who originally owned the property made the subject of this lawsuit and who was responsible for the location thereon of the suspected hazardous wastes or chemicals. Plaintiff would show that the joinder of Olin is necessary for just adjudication of this cause in that Olin Corporation has an interest relating to the subject of this action and if this action is determined without Olin Corporation being a party hereto, Defendants' ability to protect their interests will be practically impaired and leave Defendants subject to a substantial risk of incurring double, multiple or otherwise incon-

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sistent obligations arising out of the facts and claims raised by the Plaintiff's Original Complaint. Further, Defendants would show that Olin Corporation is a corporation organized and existing under and by virtue of the laws of the State of Virginia and has its principal office and place of business in Connecticut. Olin Corporation has a representative in the State of Texas for the purpose of receiving process. Accordingly, the joinder of Olin Corporation will not deprive this Court of jurisdiction over the subject matter of the action and Olin Corporation is amenable to process of this Court.

WHEREFORE, PREMISES CONSIDERED, pursuant to the provisions of Rule 12(b)(7), Defendants move that the Court enter its Order requiring the joinder of Olin Corporation in this cause before proceeding with an adjudication of the claims made in the Plaintiff's Original Complaint.

ORIGINAL ANSWER

Defendants submit the following admissions and denials in accordance with the provisions of Rule 8(b) of the Federal Rules of Civil Procedure, which responses are organized in like to paragraph designation and number as the averments of the Plaintiff's Original Complaint:

I. PLAINTIFF

Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in this portion of the Plaintiff's Original Complaint and, therefore, deny the same.

II.
DEFENDANTS

Defendant EUREKA INVESTMENT COMPANY admits that it is a Texas corporation. Defendant MUSTANG TRACTOR AND EQUIPMENT COMPANY admits that it is a Texas corporation and that its registered agent for service of process is Mr. Leonard N. Martin. Defendants deny that their principal office and place of business is 7777 Washington Avenue, Houston, Texas 77007. Defendants deny that Mustang Tractor & Equipment Company (hereinafter "Defendant Mustang") is the successor in interest of Eureka Investment Company or that it has assumed all rights, interests, assets and liabilities of Defendant Eureka Investment Company (hereinafter "Defendant Eureka").

III.
JURISDICTION

As aforesaid, Defendants are without sufficient knowledge or information to either admit or deny the first portion of these allegations. Defendants have already admitted their state of incorporation.

IV.
FACTUAL BACKGROUND

Defendant Eureka admits the allegations of Paragraph IV of the Plaintiff's Original Complaint, except that Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that "Plaintiff purchased the Property for future development." Defendant Eureka did not purchase the property from "Olin Chemical Corporation". Defendant Mustang is not alleged to have anything whatsoever to do with this transaction and, therefore, makes no response thereto.

V.

Defendants deny the allegations of Paragraph V of the Original Complaint.

VI.

Defendants are without sufficient knowledge or information to form a belief as to the truth of the averment set forth in the first two sentences of Paragraph VI of the Original Complaint and, therefore, deny the same.

Defendant Eureka admits that it employed Olshan Demolishing Company to tear down walls and buildings remaining on the property after it purchased the same. Defendant Eureka denies that it made such arrangements "shortly after purchasing the Property" and denies that during the demolition process, significant quantities of pesticides, or pesticide contaminated materials, were buried. Defendant Eureka admits it still owns the adjacent tract which was part of the original Olin tract. As to the balance of the averments and allegations set forth in Paragraph VI of the Original Complaint, Defendants are without sufficient knowledge or information to form a belief as to the truth of such averments.

VII.

Defendant Eureka admits the averments of Paragraph VII of the Original Complaint, except that Defendant Eureka received notice on August 31, 1981, and Defendant Eureka denies that Plaintiff has any cause of action under Section 17.50A(a) of the Texas Deceptive Trade Practices Act.

Defendant Mustang is without knowledge or information sufficient to form a belief as to the truth of the averments set forth in Paragraph VII of the Original Complaint.

VIII.

The averments of Paragraph VIII of the Original Complaint are statements of position to which no response is necessary by either Defendant. To the extent that any response is necessary, Defendants deny the same.

COUNT I

MUTUAL MISTAKE

IX.

COME NOW, EUREKA INVESTMENT COMPANY and MUSTANG TRACTOR AND EQUIPMENT COMPANY, sometimes hereinafter collectively referred to as "Defendants", and in like manner and paragraph to the averments made in the Original Complaint, respond to the allegations of Count I as follows:

1. Defendants hereby adopt by reference all answers and responses set forth in Paragraphs IV through VII above as if the same were set out here in full.
2. Defendant Eureka admits that it was unaware that the property was contaminated with potentially hazardous toxic chemicals. Defendant Mustang is without knowledge or information sufficient to form a belief as to the truth of the averments in Subparagraph 2 of Count I of the Original Complaint.
3. Defendants are without sufficient knowledge or information with which to form a belief as to the truth of the allegations of Subparagraph 3 of Count I of the Original Complaint insofar as the degree to which Plaintiff's entire 9.107 acres is affected.

4. Defendants are without sufficient knowledge or information to form a belief as to the truth of the averments of Subparagraph 4 of Count I of the Original Complaint and, therefore, same are denied.

5. Defendants are without sufficient knowledge or information to form a belief as to the truth of the averments of Paragraph 5 of Count I of the Original Complaint and, therefore, deny the same.

6. Defendant Eureka can neither admit or deny at this time the averments set forth in this paragraph for the reason that Defendant Eureka will be "prejudiced" in the event that it does not have a remedy against its seller, Olin, with respect to this matter. If Defendant Eureka has no remedy against Olin, then Defendant Eureka will certainly be prejudiced by rescission of the transaction if the balance of Plaintiff's averments with regard to the property are true.

Defendant Mustang is without knowledge or information sufficient to form a belief as to the truth of the averments of this paragraph.

7. Subparagraph 7 of Count I of the Original Complaint is a statement of position to which an admission or denial is not required, but to the extent the same is required, the same are denied in that no credit is allowed Defendants for the use of the property in question by Plaintiff from the time of its purchase.

8. Defendants deny the averments of Paragraph 8 of Count I of the Original Complaint.

9. Defendants deny the averments of Paragraph 9 of Count I of the Original Complaint.

COUNT II
UNILATERAL MISTAKE

X.

Further responding, Defendants answer Count II as follows:

1. Defendants hereby adopt by reference all of its denials or admissions as made in Paragraph IV through VII above and Defendants rely upon their answers therein as if such answers were set forth here in full.
2. Defendants are without sufficient knowledge or information sufficient to form a belief as to the truth of the allegations of Subparagraph 2 of Count II of the Original Complaint.
3. Defendants are without sufficient knowledge or information with which to form a belief as to the truth of the allegations of Subparagraph 3 of Count II of the Original Complaint.
4. Defendants hereby adopt by reference all of their answers as set forth in Count I, Paragraph IX, Subparagraphs 3 and 4 above and Defendants rely upon the same as if set forth here in full.
5. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph, except that Defendant Eureka would show that Plaintiff has received the value of the use of the property since the date that Plaintiff purchased the same.
6. Defendants hereby adopt by reference all of their answers to Subparagraphs 6, 7, 8 and 9 of Paragraph IX of Count I above and Defendants rely upon their responses thereto as if the same were set out here in full.

COUNT III

FAILURE OF CONSIDERATION

XI.

Further pleading, Defendants respond to the allegations of Count III as follows:

1. Defendants adopt by reference all of their responses to Paragraphs IV through VII above and rely upon the same as if they were set out here in full.

2. Defendants are without sufficient knowledge or information with which to form a belief as to the truth of the allegations of Subparagraph 2 of Count III of the Original Complaint and, therefore, deny the same. Specifically, Defendant Eureka denies that Plaintiff has received no consideration for the property in that there has been some value in the use of the property. The balance of the averments in this paragraph are statements of position to which no response is necessary.

3. Defendants adopt by reference all of their responses to the allegations set forth in Count I, Paragraph IX, Subparagraphs 6, 8 and 9 above and rely upon their responses therein as if such were set out here in full.

COUNT IV

FRAUD IN THE INDUCEMENT

XII.

Further pleading, Defendants answer Count IV as follows:

1. Defendants adopt their correspondingly numbered responses to Paragraphs IV through VII above and the allegations made therein in the Plaintiff's Original Complaint, and incorporate such responses by references as if the same were set out here in full.

2. Defendants are without sufficient knowledge or information with which to form a belief as to the truth of the averment that Plaintiff was acquiring the property for "future development" and also with regard to the balance of the averment set forth in this paragraph.

3. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in the paragraph.

4. Defendant Eureka denies the averments of Paragraph 4 of Count IV of the Original Complaint.

Defendant Mustang is not referred to in said paragraph and, therefore, makes no response to the same. To the extent that Plaintiff directs any such of its averments or allegations at Defendant Mustang, Defendant Mustang denies the same.

5. Defendant Eureka denies the averments of this paragraph.

Defendant Mustang is not mentioned in the averments set forth in Paragraph 5 and, therefore, no response is requested. To the extent that Plaintiff's allegations are directed at Defendant Mustang in any capacity, Defendant Mustang denies them.

6. Defendant Eureka denies the averments of Subparagraphs 6, 7, 8, 9, 10 and 11 of Count IV of the Original Complaint.

Defendant Mustang is not mentioned in any averment or allegation in Subparagraphs 6, 7, 8 or 9, and therefore, Defendant Mustang is not required to make any response thereto. However, to the extent that Plaintiff has any reference whatsoever to Defendant Mustang in connection with the said allegations, Defendant Mustang denies the same. Specifically, Defendant Mustang denies the averments and allegations of Subparagraph 10 of Count IV of the Original Complaint.

COUNT V
DECEPTIVE TRADE PRACTICES

XIII.

Further pleading, Defendants respond to the allegations of Count V of the Original Complaint as follows:

1. Defendants adopt their responses to the correspondingly numbered paragraphs as if the same were set forth here in full.

2. Defendant Eureka denies it is generally engaged in "trade and commerce" as contemplated by the cited portion and act, but admits that on or about July 11, 1978, it sold the mentioned property to the Plaintiff.

Defendant Mustang is without knowledge or information sufficient to form a belief as to the truth of the averments of Subparagraph 2 of Count V, and, therefore, denies the same.

3. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of Subparagraph 3 of Count V, of the Original Complaint and, therefore, deny the same.

4. Defendant Eureka denies the averments and allegations of Subparagraphs 4 and 5 of Count V of the Original Complaint.

Defendant Mustang is not mentioned in any of the allegations or averments of Subparagraphs 4 and 5 of Count V of the Original Complaint and, therefore, no response is necessary. To the extent that Plaintiff intends any such allegations to be directed against Defendant Mustang, Defendant Mustang denies the same.

5. Defendants adopt by reference all of their answers heretofore stated to the allegations of Subparagraph 10 of Paragraph XII of Count IV of the Original Complaint as if the same were set out here in full.

6. Defendant Eureka denies the averments and allegations set forth in Subparagraph 7 of Count V of the Original Complaint.

Defendant Mustang is not mentioned in any such averments or allegations, but to the extent that Plaintiff intends any allegations contained therein to be directed at Defendant Mustang, Defendant Mustang denies the same.

COUNT VI

FRAUD IN A REAL ESTATE TRANSACTION

XIV.

Further pleading, Defendants make their answers and responses to the allegations of Count VI of the Original Complaint as follows:

1. Defendants adopt their answers set forth hereinabove to the correspondingly numbered and cited paragraphs as if the responses to such referenced averments were set out here in full.
2. Defendants adopt their answers set forth hereinabove to the correspondingly numbered and cited paragraphs as if the responses to such referenced averments were set out here in full.
3. Defendant Eureka denies the allegations of Subparagraph 3 of Count VI of the Original Complaint.

Defendant Mustang is not mentioned in the averments and allegations of this paragraph, but to the extent that Plaintiff intends any such allegations to be made against Defendant Mustang, Defendant Mustang denies the same.

4. Defendants adopt their answers as set forth in the correspondingly numbered Subparagraphs 6, 7, 8 and 10 of Paragraph XII of Count IV above as if the same were set out here in full.

5. Defendants deny the allegations of Subparagraphs 5 and 6 of Count VI of the Original Complaint.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendants pray that upon consideration hereof by the Court and a Jury, that Defendants be dismissed without liability and that Defendants recover their costs herein expended, that Defendants receive such other and further relief, both general and special, at law and in equity, to which Defendants may show themselves justly entitled.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing Defendants' Answer and Response to Plaintiff's Original Complaint is being forwarded to the Attorney in Charge for Plaintiff, W. T. Womble, Crain, Caton, James & Womble, 3300 Two Houston Center, Houston, Texas 77010, by United States mail, postage prepaid, or by hand delivery on this the _____ day of _____, 1982.

FRED W. STUMPF